(2)

Supreme Court, U.S.
FILED
OCT 30 2003
OFFICE OF THE CLERK

No. 03-948

In the Supreme Court of the United States

MICHELLE SMITH

Petitioner,

v.

NORMA ALICE JONES, ACTING IN HER CAPACITY AS PRESIDENT, AND GAYNELL L. PITTMAN, ACTING IN HER CAPACITY AS TREASURER OF THE MAUK-CHARING-NORWICH COMMUNITY CLUB, AN UNINCORPORATED ASSOCIATION OF NATURAL PERSON RESIDING IN THE STATE OF GEORGIA, COUNTY OF TAYLOR

Respondents

SUPPLEMENTAL APPENDIX

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Pro Se Petitioner

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July 29, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

NORMA ALICE JONES, acting in her capacity as President, and GAYNELL L. PITTMAN, acting in her capacity as Treasurer, of the Mauk-Charing-Norwich Community Club,	*	FILED U.S. DISTRICT COURT MIDDLE GEORGIA 02 NOV 18 AM10:47 s/ DEPUTY CLERK
Plaintiffs	*	
vs.	*	Case No. 4:02-CV-117-3 (CDL)
TAYLOR COUNTY BOARD OF EDUCATION and BONNIE MICHELLE SMITH,	*	
Defendants	*	

ORDER

The Court presently has pending before it Plaintiffs' Motion to Remand, Plaintiffs' Motion to Set Aside the Clerk's Entry of Default, and Defendant Smith's Motion for Default Judgment. For the reasons set forth below, the Court grants Plaintiffs' Motion to Remand and Motion to Set Aside the Clerk's Entry of Default. Given the Court's granting of these motions, Defendant Smith's Motion for Default Judgment is denied as moot.

PROCEDURAL BACKGROUND

This case is before the Court after having been removed to this Court by Defendant Smith. This case originated in the Superior Court of Taylor County, Georgia, when Plaintiffs, Norma Alice Jones and Gaynell L. Pittman, acting in their capacity as officers of the Mauk-Charing-Norwich Community Club (hereinafter "Plaintiffs" or "MCNC Club"), filed suit, seeking injunctive relief and a declaration that a deed from Defendant Taylor County Board of Education (the "Board of Education") to Defendant, Michelle Smith, (hereinafter "Defendant" or "Smith") (Footnote 1) was null and void.

This case arises from a dispute over whether a deed transferring a reversionary interest from the Board of Education to Smith is valid or whether that deed is void because of an earlier transfer of the same interest from the Board of Education to the MCNC Club. Smith (Footnote 2) subsequently sought to remove the case to this Court, claiming that the case involves questions of federal law, thus authorizing subject matter jurisdiction. After removing the case to this Court, Smith filed an answer and a counterclaim. In her counterclaim, Smith asserts claims for relief under the federal RICO statute (Count I) and Georgia's defamation and libel law (Count II). Smith also maintains that allowing the case to proceed in state court will result in a denial of her civil rights. Moreover, she contends that Plaintiffs' claims can more fairly be characterized as claims under the federal National Historic Preservation Act, 16 U.S.C. § 470 et seq., thus providing another ground for federal subject matter jurisdiction. Upon receiving notice that the case was removed to federal court, Plaintiffs filed a Motion to Remand based on lack of subject matter jurisdiction. Smith responded to this motion and subsequently filed a Motion for Entry of Default based on Plaintiffs' failure to respond to her counterclaim. Since Plaintiffs filed no answer to the counterclaim within twenty days of the service date, the Clerk made an entry of default, which entry Plaintiffs now seek to set aside.

After the Clerk's entry of default, Smith filed a Motion for Default Judgment and for a Hearing for Assessment of Damages. The Court held a hearing on November 12, 2002, on Plaintiffs' Motion to Remand, Plaintiffs' Motion to Set Aside Clerk's Entry of Default, and Defendant's Motion for Default Judgment.

DISCUSSION

A. Plaintiffs' Motion to Remand

Smith asserts four separate grounds for subject matter jurisdiction in this case. First she contends that her federal RICO counterclaim involves a question of federal law authorizing federal question jurisdiction. Second, she argues that allowing this mater to remain in state court will result in a denial of her civil rights, requiring that removal be permitted pursuant to 28 U.S.C. § 1443(1). Third, Smith maintains that this case is removable under 28 U.S.C. § 1443(2), which permits federal jurisdiction in a limited category of cases involving federal officials. Finally, Smith contends that the true nature of Plaintiffs' claims involving federal law issues which Plaintiffs have artfully disguised in their pleading to avoid federal jurisdiction, and therefore, the case is removable under 28 U.S.C. § 1441. For the reasons set forth below, each of Smith's arguments for federal jurisdiction must be rejected. Accordingly, the case is remanded to the Superior Court of Taylor County, Georgia.

1. Smith's Counterclaim

It is clear that Smith's federal RICO count included in her counterclaim cannot create subject matter jurisdiction in this Court. The Supreme Court has held that a counterclaim involving a federal question cannot serve as a basis for removal, just as a federal defense cannot. *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 122 S. Ct. 1889, 1893-94 (2002) ("(A) counterclaim . . . cannot serve as the basis for 'arising under' jurisdiction."). Therefore, it is beyond dispute that Smith's counterclaim on its face provides no basis for federal jurisdiction.

2. Removal Under 28 U.S.C. § 1443(1)

Defendant's primary contention is that this case is properly removable under 28 U.S.C. § 1443(1). Section 1443(1) provides that a case may be removed to federal court where a "person . . . is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States . . . ." § 1443(1). Smith contends that if she is required to litigate this case in the Superior Court of Taylor County, Georgia, that her civil rights will be denied. The Supreme Court, in Georgia v. Rachel, 384 U.S. 780, 788 (1966), set forth a two-prong test ("the Rachel test") for removal under this statutory provision. In order to remove a case under § 1443(1), a defendant must show "both that the right upon which they rely is a 'right under any law providing for . . . equal civil rights' and that they are 'denied or cannot enforce' that right" in state court. Id.

Smith claims that she is being denied her civil rights under 42 U.S.C. § 1985 (3), which, in essence, makes it illegal to conspire to deny another person equal protection under the law. Thus, in order to warrant removal, Smith must show that § 1985 (3) satisfies both prongs of the Rachel test. Assuming arguendo that § 1985(3) is an "equal civil rights" statute thus satisfying the first prong of the Rachel test, the recent Eleventh Circuit case, *Alabama v. Conley, 245 F. 3d 1292 (11th Cir. 2001), makes it clear that Smith cannot satisfy the second* prong of Rachel. (Footnote 3) Therefore, the case is not removable pursuant to § 1443(1).

In *Alabama v. Conley*, the plaintiff filed an eminent domain action in state court seeking to condemn various parcels of land owned by the defendant. Id. at 1293. The defendant removed the case to federal court. The district court granted the plaintiff's motion to remand, and the court of appeals affirmed. Id. While the Eleventh Circuit Court of Appeals assumed § 1985(3) met the first prong of the Rachel test, it held that the statute did not contain a specific provision that insulated the defendant from an eminent domain proceeding in state court. Id. at 1298. Specifically, the court found that, unlike the Civil Rights Act of 1964 at issue in the

Rachel case, which provided a specific right to trespass when making a peaceful attempt to be served on an equal basis in establishments covered by the Act, no similarly explicit prohibition against proceedings in state court based on the defendant's actions is provided for in Section 1985(3). Id. at 1296-98. In other words, there was no conflict between the state eminent domain law and Section 1985(3).

Applying that rationale to the present case, it is clear that this case is not removable under § 1443(1). Plaintiffs' right to institute a quiet title action in state court does not conflict with § 1985(3), which contains no explicit prohibition on this type of suit. The Conley case also explicitly mandated that a defendant's allegations that he or she cannot receive a fair trial in a particular state court does not mean removal should be granted under § 1443(1). Id. at 1298-99. Rather, the Supreme Court "has made clear" that this is not the case. Id. Thus, Defendant's allegations that the Superior Court in Taylor County is hostile toward African-Americans do not provide her with a basis for removal. (Footnote 4) The Supreme Court has held that in such instances, if a defendant is indeed discriminated against or otherwise harmed in his or her pursuit of justice in state court, there are other avenues to vindication which are more proper than removal, including filing a separate suit. See *City of Greenwood v. Peacock*, 384 U.S. 808, 827-31 (1966) (discussing various remedies available to a defendant whose rights are not vindicated in state court). In particular, the Court stated:

> It is not enough to support removal under § 1443(1) to allege . . . that the defendant's equal civil rights have been . . . denied by state administrative officials in advance of trial . . . or that the defendant is unable to obtain a fair trial in a particular state court . . . . The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial.

Id. at 827-28. This language has been cited with approval by the courts in this circuit. See, e.g., *Alabama v. Conley*, 245

F.3d 1292, 1297 (11th Cir. 2001); *Perkins v. Mississippi*, 455 F. 2d 7, 34 n.63 (5th Cir. 1972). (Footnote 5)

Based on the foregoing, the Court finds that Smith cannot satisfy the second prong of the Rachel test, and therefore, this case is not removable pursuant to 28 U.S.C. § 1443(1).

3. Removal Under 28 U.S.C. § 1442(2)

Smith next maintains that the suit is removable under 28 U.S.C. § 1443(2), an argument that reveals either a complete misunderstanding of the law or a bold willingness to expose oneself to Rule 11 sanctions. The Supreme Court has made very clear that this statute applies only to federal officers and persons assisting such officers in their official duties. Peacock, 384 U.S. at 815-24. Since no federal officers are involved in this case, § 1443(2) provides no basis for federal jurisdiction, even under the most strained or imaginative application.

4. Exception to the Well-Pleaded Complaint Rule

Finally, Smith argues that Plaintiffs truly assert a federal claim but have cleverly disguised it to avoid federal jurisdiction. As a general rule, a plaintiff is the master of his complaint and may choose not to proceed in federal court by pursuing state law claims to the exclusion of possible federal law claims. See, e.g., *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). However, an independent corollary to this rule provides that a plaintiff cannot defeat removal by failing to plead a necessary federal question. *Franchise Tax Bd. V. Constr. Laborers Vacation Trust*, 463 U.S. 1, 23-25 (1983). This exception, also referred to as the "artful pleading doctrine," allows removal where federal law completely preempts a plaintiff's state law claim. Rivet v. Regions Bank, 522 U.S. 470, 475 (1998).

In the case at bar, Smith claims that Plaintiffs' failure to bring suit is based upon the MCNC Club's objection to the property in question being put on the National Historic Register. Therefore, Smith maintains, the case falls within an exception to the well-pleaded complaint rule and is properly removable under 28 U.S.C. § 1441.

However, she points to no federal statute that completely preempts this state lawsuit to quiet title, undoubtedly because

no such statute exists. (Footnote 6) The Court finds that the artful pleading doctrine provides no basis for federal jurisdiction in this case, and therefore, the case is not removable under 28 U.S.C. § 1441.

To summarize, no basis exists for this Court to exercise federal subject matter jurisdiction over this case. Accordingly, Plaintiff's Motion to Remand is granted, and this case is remanded to the Superior Court of Taylor County, Georgia.

B. Plaintiffs' Motion for Costs

Plaintiffs, in their Motion for Remand, seek to recover their costs, including attorneys' fees, under 28 U.S.C. § 1447(c), claiming removal was clearly not authorized. The award of costs under Section 1447(c) falls within the sound discretion of the trial court. Although the Court is tempted to assess costs against Smith based upon the weakness of her arguments in support of removal, the Court will give her the benefit of the doubt, finding that she had at least one good faith and arguably plausible, albeit weak, ground for removal. Accordingly, the Court declines to award costs to Plaintiffs.

C. Plaintiffs' Motion to Set Aside Clerk's Entry of Default

Although the Court orders that this case be remanded, the Court finds for the sake of judicial economy that it should rule on Plaintiffs' Motion to Set Aside Clerk's Entry of Default prior to remand. For the reasons set forth below, the Court grants Plaintiffs' motion.

Smith moved for an entry of default under Fed. R. Civ. P. 55(a) after Plaintiffs failed to answer her counterclaim in a timely manner. The clerk subsequently made such an entry. Under Fed. R. Civ. P. 55(c), the Court may set aside an entry of default "for good cause shown." The Eleventh Circuit Court of Appeals has described three factors that should be considered: (1) whether the default was willful or culpable; (2) whether a set aside would prejudice the non-defaulting party; and (3) whether the party in default has a meritorious defense. *Compania Interamericana Export-Import, S.A. v. Compania Dominicana de Aviacion*, 88 F.3d 948, 951 (11th Cir. 1996).

The Federal Rules of Civil Procedure recognize that when a Defendant makes a preliminary motion that may dispose of a complaint the Defendant should not be required to file an answer to the complaint until after the motion has been disposed of or the court orders that an answer be filed. See Fed. R. Civ. P. 12(a) (4). This rule, however, does not apply to motions to remand. Nevertheless, in the spirit of that rule, the Court finds that under the circumstances of this case where the motion to remand was filed based upon an alleged lack of subject matter jurisdiction, Plaintiffs should have been excused from filing an answer to the counterclaim until their motion to remand was decided. (Footnote 7) Therefore, the Court finds that good cause exists to set aside the clerk's entry of default. The Court further notes that Plaintiffs clearly had a meritorious defense based upon lack of subject matter jurisdiction as recognized by the Court's granting of Plaintiffs' motion to remand. Accordingly, Plaintiffs' Motion to Set Aside the Clerk's Entry of Default is granted.

D. Defendant's Motion for Default Judgment

In light of the Court's granting of Plaintiffs' Motion to Remand and Motion to Set Aside Entry of Default, the Court finds that Defendant's Motion for Default Judgment is rendered moot and is therefore denied.

CONCLUSION

For the foregoing reasons, the Court grants Plaintiffs' Motion to Remand and Plaintiffs' Motion to Set Aside the Clerk's Entry of Default. The Court denies Smith's Motion for Default Judgment. Accordingly, this case is hereby remanded to the Superior Court of Taylor County, Georgia.

IT IS SO ORDERED, this 15th day of November, 2002.

/s/
CLAY D. LAND
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
November 19, 2002

/s/
Gregory J. Leonard, Clerk

(Footnote 1) Smith is an attorney proceeding pro se in this matter. The liberal construction generally given to pro se litigants is not available to attorneys who choose to represent themselves. See, e. g., *Olivares v. Martin*, 555 F.2d 1192, 1194 n.l (5th Cir. 1977).

(Footnote 2) The Board of Education did not join Smith's motion for removal.

(Footnote 3) The Court has been unable to find any case conclusively deciding whether Section 1985(3) qualifies as an "equal civil rights" statute. The courts that have considered the question have made the assumption that it was such a statute and proceeded with an analysis of whether the second Prong of the Rachel test was satisfied. See, e.g., Alabama v. Conley, 245 F.3d 1292 (11th Cir. 2001); Davis v. Glannon, 107 F. 3d 1044 (3rd Cir. 1997); Bd. Of Educ. V. Am. Fed'n of State,

County and Mun. Employees, AFL-CIO, 401 F. Supp. 687 (N.D. Ga. 1975).

(Footnote 4) Smith herself is Caucasian. She bases her claims of hostility principally on the potential animus in Taylor County toward her clients, who are primarily poor African-American individuals, and the possible ill-effects she might face as a result of representing such individuals in this environment. Whether such an argument entitles Smith to raise a claim for a denial of her civil rights need not be decided in this case and the Court expresses no opinion on the merits of such an argument.

(Footnote 5) The Eleventh Circuit adopted the decisions of the former Fifth Circuit rendered prior to October 1, 1981, in Bonner v. City of Prichard, 661 F. 2d 1206, 1209 (11th Cir. 1981) (en banc).

(Footnote 6) Smith once again tests the Court's general reluctance to impose Rule 11 sanctions. Smith's contention is particularly disturbing given the fact that no evidence exists apart from her own self-serving statements that Plaintiffs even oppose the property being placed on the National Historic Register. Moreover, the case cited by Smith in support of her untenable position, *Committee to Save the Fox Building v. Birmingham Branch of the Federal Reserve Bank*, 497 F. Supp. 504 (N.D. Ala. 1980), is completely inapposite.

(Footnote 7) *Accord Ritts v. Dealers Alliance Credit Corp.*, 989 F. Supp. 1475 (N.D. Ga. 1997).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

NORMA ALICE JONES, acting in her capacity as President, and GAYNELL L. PITTMAN, acting in her capacity as Treasurer, of the Mauk-Charing-Norwich Community Club, an unicorporated association of natural persons residing in the State of Georgia, County of Taylor, Plaintiff, vs. THE TAYLOR COUNTY BOARD OF EDUCATION and MICHELLE SMITH, Defendant	)	Case No.: PETITION FOR REMOVAL

PETITION FOR REMOVAL

Petitioner, a defendant in the above styled action and an attorney admitted to practice in the United States District Court, Middle District of Georgia, respectfully shows the Court:

1. The above-entitled action was commenced in the Superior Court of Taylor County, State of Georgia, on July 3, 2002, served on Defendant, Michelle Smith, on July 25, 2002, and is now pending in that court under a Rule Nisi for the action to be heard on July 30, 2002.
2. Petitioner was served with summons and a copy of plaintiff's complaint and Rule Nisi on July 25, 2002.
3. The action is a civil action to set aside a deed.
4. Thirty days have not yet expired since the action became removable to this court.

5. The above-entitled civil action against petitioner in the Taylor County Superior Court may be removed to this Court pursuant to 28 U.S.C. § 1443 (1), 28 U.S.C. § 1443 (2), 42 U.S.C. § 1985 (2), 42 U.S.C. § 1985 (3), and an exception to the well-pleaded complaint rule on the grounds that the petitioner is and has been denied rights and privileges secured and guaranteed by the laws providing for equal rights of citizens of the United States, including the right to the enjoyment and use of defendant's own property, and that the real nature of the plaintiff's claim does nor arise out of state law but under federal law, 16 U.S.C. § 470 et. seq.
6. Such denial of the above listed rights has occurred and continues to occur in the denial of defendant's rights in that :
    (a) Members of the MCN Club have performed various acts of intimidation since the filing of the lawsuit on July 3, 2002, including:
        (1) Norma Alice Jones, and Gaynell L. Pittman, plaintiffs in the action, on Sunday, July 13, 2002 , concealed their identity in disguise, stalking plaintiff, Michelle Smith, at the Mauk Schoolhouse with the purpose of depriving the defendant of her use and enjoyment of her property. The Taylor County Sheriff's Office responded to the call.
        (2) A fire destroyed the historic 1912 Harbuck Home Place in Mauk, Georgia of which defendant is an heir in the early morning hours of Thursday, July 11, 2002. Defendant is only scheduled to be at the Mauk Schoolhouse Office on Thursdays. This historic home was en route to Defendant's Office.
        (3) Norma Alice Jones, plaintiff, filed a frivolous and baseless grievance against the plaintiff with the State Bar

of Georgia on July 10, 2002 with the purpose of intimidating the defendant.

(4) Prior to the filing of the complaint on July 3, 2002, on Thursday, June 6, 2002, a rattlesnake was deliberately placed in an area of the Schoolhouse where the defendant has access. The rattlesnake was placed in the building in a paper sack after the defendant refused to deed the Mauk Schoolhouse property over to the plaintiffs.

7. Notice of the removal does not specifically include the Defendant, Taylor County Board of Education in the joinder of the removal because if removal is based on a specific statutory authority for removal then only those defendants to the removable claim must join in the removal notice.
8. The defendant, Michelle Smith, is an attorney in the Chattahoochee Circuit who represents poor, rural clients, both black and white. Her full name is Bonnie Michelle Smith.
9. The defendant, Michelle Smith, has hired black contractors and black landscape contractors to assist with the building during her ownership. Prior to defendant's ownership all contractors had been white.
10. The defendant, Michelle Smith, has asked the Chattahoochee Circuit to excuse her from all criminal appointments for fear of her personal safety.
11. The Taylor County Courthouse in Butler, Georgia does not have adequate security or metal detectors to ensure defendant's safety in open court on July 30, 2002.
12. The defendant is further denied or cannot enforce her rights to defend her action in state court for fear of her personal safety in state court.

13. Copies of all pleadings, process, and orders served on the petitioner in the action are attached and marked Exhibit A.

WHEREFORE, petitioner prays that the above-entitled action be removed from the Superior Court of Taylor County, State of Georgia, to the United StateS District Court for the Middle District of Georgia, Columbus Division.

Dated this 29th day of July, 2002

/s/_____

Bonnie Michelle Smith
Georgia Bar No. 654848
Defendant and Attorney
Representing Self Pro-Se
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STATE OF GEORGIA)
COUNTY OF HOUSTON)

I, Michelle Smith, being first duly sworn, say that I am the defendant in the above-described action, and that the above petition is true and correct, dated this July 29, 2002.

/s/_____
Michelle Smith

/s/_____
Notary Public

My commission expires:_____

(NOTARIAL SEAL)

Filed and entered into the District Court Docket July 29, 2002.